



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2013

Ms. Brandy N. Davis
Counsel for the Plano Independent School District
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2013-00910

Dear Ms. Davis:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 476127.

The Plano Independent School District (the "district"), which you represent, received a request for information pertaining to three named individuals, communications sent to school board trustees from a named individual regarding a specified elementary school during a specified time period, and information requested through public information requests regarding the three named individuals during specified time periods. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the portion of the request seeking information requested through public information requests regarding the three named individuals. To the extent such information existed on the date the district received the request, we presume you have released it. If not, the district must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we note that the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local

educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). We understand you have redacted information under FERPA. However, we note you have also submitted unredacted education records for our review. Because this office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.² However, we will consider your exceptions to disclosure of the remaining information under the Act.

We next note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov’t Code § 552.022(a)(1), (3). The submitted information contains completed evaluations and completed reports that are subject to subsection 552.022(a)(1). The district must release the completed evaluations and reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information

¹A copy of this letter may be found on the attorney general’s website, <http://www.oag.state.tx.us/open/20060725usdoc.pdf>.

²If in the future the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

also contains contracts that are subject to subsection 552.022(a)(3), which the district must release unless they is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the information subject to subsections 552.022(a)(1) and 552.022(a)(3) under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the information subject to subsections 552.022(a)(1) and 552.022(a)(3) may not be withheld under section 552.103 or section 552.107 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to subsections 552.022(a)(1) and 552.022(a)(3). We will also address the applicability of sections 552.101, 552.102, 552.117, and 552.135 for the information subject to subsections 552.022(a)(1) and 552.022(a)(3) because these sections can make information confidential under the Act.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state some of the submitted information consists of a communication between an attorney for and representatives of the district that were made in furtherance of the rendition of professional legal services to the district. You inform us the communication in question was made in confidence and has not been shared or distributed to non-privileged parties. Based on your representations and our review of the information at issue, we find you have established the information at issue, which we have marked, consists of privileged attorney-client communications. Therefore, we conclude the district may withhold the information we have marked under Texas Rule of Evidence 503.

Section 552.101 of the Government code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides in part that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). We have determined that for purposes of section 21.355, the word “teacher” means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. This office also has concluded an “administrator” is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of the evaluation. *See id.*

You state the submitted information consists of evaluations that pertain to individuals who were employed by the district as teachers or administrators when their performance was evaluated. You also state these individuals hold the appropriate certifications under subchapter B of the Education Code. Based on your representations and our review, we find the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we

conclude you have not demonstrated any of the remaining information evaluates the performance of a teacher or administrator for purposes of section 21.355. Accordingly, none of the remaining information may be withheld under section 21.355 of the Education Code in conjunction with section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the information subject to section 552.022 may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Accordingly, if the district employees whose information is at issue timely elected to keep their information confidential pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117 if the employees did not timely elect to keep their information confidential. As you raise no further exceptions, the remaining information subject to section 552.022 must be released.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

You claim section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, a lawsuit styled *Doe et al v Plano ISD and Linda Engleking*, Case No. 4:12-cv-00409 was pending in the United States Eastern District of Texas, Sherman Division on the date the district received the instant request for information. You further state the remaining information is related to the pending litigation because it pertains to the claims in the lawsuit. Upon review of your arguments and the information at issue, we find litigation was pending when the district received the request for information and the remaining information relates to that pending litigation. Therefore, we find the district may withhold the remaining information under section 552.103 of the Government Code.⁴

Generally, however, once information has been obtained by all parties to the litigation though discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

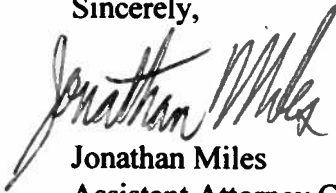
section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence. The district must withhold the information we have marked under section 21.355 of the Education Code under section 552.101 of the Government Code. The district must withhold the information we have marked under common-law privacy under section 552.101 of the Government Code. If the district employees whose information is at issue timely elected to keep their information confidential pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must release the remaining information subject to subsections 552.022(a)(1) and 552.022(a)(3). The district may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 476127

Enc. Submitted documents

c: Requestor
(w/o enclosures)